

GUIDELINES

ON THE

SPECIAL NIC RULES

FOR

ENTERTAINERS



ISSUED BY

Inland Revenue

April 2005(Revised)

GUIDELINES ON THE NIC RULES FOR ENTERTAINERS

Introduction

1. The NIC treatment of entertainers is different to that which applies for tax. Following the Special Commissioners' case for *McCowen and West* the Inland Revenue accepted that most performers/artists in the entertainment sector, engaged under Equity contracts, were engaged under contracts for services and would generally be assessable to tax under Schedule D. However, it was recognised that to follow this line for NIC purposes would mean that the majority of entertainers who had previously paid Class 1 NICs would only be liable for Class 2 and Class 4 NICs which would not provide them with universal title to contributory benefits.
2. DSS Ministers, therefore, decided that they would introduce regulations which would treat the majority of entertainers as employed earners for NIC purposes. This would enable entertainers to build up entitlement to contribution based Jobseeker's Allowance and ensure that, in a precarious industry, new talent could be encouraged to weather long periods without work whilst they established themselves.
3. Prior to 1998, the main category of performers in the entertainment industry not paying Class 1 contributions were certain 'Key Talent' stars who were generally regarded as having been engaged on productions because of their celebrity status. To try and ensure this practice continued The Social Security (Categorisation of Earners) (Amendment) Regulations 1998 were introduced from 17 July 1998 which created a liability for Class 1 NICs for entertainers whose earnings consisted 'wholly or mainly of salary'. Those for whom a fee was negotiated or received rights and additional use payments, higher than the salary element were not liable to pay Class 1 NICs but were regarded as self-employed as such payments did not come within the definition of 'salary', derived from case law.¹
4. Most entertainers in the theatre industry are mainly remunerated by salary and would be subject to the 1998 Regulations. However, it has become the usual practice for the majority of entertainers in the Film industry and some in the TV industry to receive as part of their remuneration package pre-purchase

¹ There is no statutory definition of the word 'salary'. Remuneration does, however, have to have all of the following characteristics to be regarded as 'salary':

- It is paid for services rendered or to be rendered
- It is paid under some contract or appointment
- It is computed by reference to time worked
- It is payable at a specified time or at specified intervals
- It is paid for regular work

The above statements are based on the cases of *Re Shine, ex parte Shine* [1892, 1QB522] and *Greater London Council v Minister of Social Security* [1971, 2 All ER285]

payments as compensation for the loss of future repeat fees and rights and royalties worth many times the salary element. In addition Equity agreements in the TV industry typically provide for repeat fees to be paid as and when those repeats are transmitted. Over time the value of these in many cases exceeds the level of salary. Few actors were, therefore, paid ‘wholly or mainly’ by salary and it was realised that the regulations did not achieve the desired object of bringing most entertainers into Class 1.

5. The Revenue, therefore, accepted that the 1998 regulations were not sustainable and new regulations were introduced from 6 April 2003. These were the Social Security (Categorisation of Earners) (Amendment) Regulations 2003[SI 2003 No. 736]. Equivalent regulations SI 2003 No 733 apply for Northern Ireland.
6. These guidance notes explain:
 - the criteria from 6 April 2003 to determine whether an entertainer is to be treated as an employed earner;
 - how the regulations affect all parts of the entertainment industry;
 - how engagers and entertainers can claim refunds of wrongly paid Class 1 contributions as a consequence of the 1998 regulations;
 - how further help and information about the tax/NIC treatment of entertainers can be obtained.
7. The notes are divided into two sections to provide details about the NIC position of entertainers as a consequence of these changes:
 - Section A explains the 2003 regulations in detail.
 - Section B gives information on the arrangements for enabling engagers and entertainers to claim refunds of Class 1 NICs paid in error as a consequence of the superseded regulation.

SECTION A

THE SOCIAL SECURITY(CATEGORISATION OF EARNERS) (AMENDMENT) REGULATIONS 2003

1. The regulations from 6 April 2003 reflect the fact that instead of a ‘wholly or mainly’ salary test, those entertainers² whose remuneration includes any element of salary, as defined below, will be treated as employed earners. Once subject to the regulations there will be liability for Class 1 NICs on all earnings from the engagement (including rights payments.)
2. The regulations are aimed at reflecting the NICs position of entertainers

prior to July 1998, when there was a distinction between entertainers regarded as self-employed and those regarded as employees, based on the terms and conditions of their engagements. The vast majority of entertainers are engaged on the basis of payments of salary, but a small proportion are only paid a fee for an engagement which is not dependent upon the time worked.
3. Where the payment is a fee for the production, not a salary - and this would have to be made clear in the contract – the entertainer will remain self – employed for NICs purposes and liable to Class 2 and Class 4 NICs.
4. For the avoidance of doubt the position with regard to liability for Class 1 NICs on rights payments from contracts entered into where services are provided after April 2003 is:
 - If the initial payment under the terms of the contract (including pre-purchased rights payments) is not subject to NICs because no salary element is included in the remuneration then any subsequent rights payments made will not be subject to Class 1 NICs;
 - If there is a liability for Class 1 NICs on the initial payment because any part of that payment satisfies the definition of salary then any subsequent rights payments will also be subject to Class 1 NICs. This applies even if the contract period has ended and the repeat programme is not broadcast by the original production company as in the case of the BBC/PACT agreement (from January 2004) whereby the BBC take out a licence to use the programme and pay the production company for any repeat fees due. In this event the original production company will continue to be the liable secondary contributor in respect of the entertainer as defined by regulation 4 of the 2003 regulations [see paragraph 7 below]. The broadcaster must,

² Entertainer is defined in the Social Security (Categorisation of Earners) Regulations 1978 as a “person employed as an actor, singer or musician or in any similar performing capacity.” This includes such professions as dancers, voice-overs and walk-on parts. TV Presenters and news reporters are not regarded as entertainers for the purposes of the legislation.

therefore, inform the production company that it will have ongoing liability for Class 1 NICs. Those broadcasting companies not subject to the PACT agreement will need to inform the relevant production company when the repeat broadcast takes place and the amounts paid.

5. 'Salary' is now defined in the 2003 regulations which requires that the following four tests need to be satisfied:
 - made for services rendered;
 - paid under a contract for services;
 - where there is more than one payment, payable at a specified period or interval; and
 - computed by reference to the amount of time for which work has been performed.
6. The third bullet point ensures that those entertainers engaged on a single day or two-day engagement are covered by the legislation. This means that the policy intention of ensuring that the regulations apply to film extras and walk-on parts is achieved. The last bullet point, should apply to all entertainers, apart from a very small minority, who are contracted to appear in productions for which their remuneration is not directly calculated according to the period of weeks or months they are assigned to the production. Revenue solicitors have confirmed that the words "by reference to" in this context should be interpreted widely to the extent that, should there be any link between the amount of the fee paid and the number of days worked or the period of the engagement, (whether or not there is a contractual requirement for work to be performed on each and every day,) then this bullet will be satisfied.
7. The legislation also includes provisions which amend paragraph 10 of Schedule 3 to the Social Security (Categorisation of Earners) Regulations 1978 to ensure that in all cases where the entertainer is treated as an employed earner by the regulations, the secondary contributor is treated as the producer of the entertainment in respect of which the payments of salary are made. Since the first edition of this guidance was published it has become apparent that some confusion has arisen throughout the industry over the wording of this provision.
8. Because *the person* to whom the payments of salary are made is not described in column A of para 5A of Schedule 1 it was necessary for the draftsman to refer to the column B description "any person in employment described in para 5A in column (A)..." Although these words appear under the heading 'Person excepted from the operation of column (A)' this does not negate the effect of the regulation nor does it override the effect of the Intermediaries legislation (IR35) which provides that where an entertainer provides his services to a client through a personal service company it is the latter which is the secondary contributor.
9. As part of the function of Government, Inland Revenue Officers are required to

carry out periodic compliance checks. Where there is evidence that entertainers are paid a salary but the contract has been framed in such a way so as to treat the payment as a fee in order to avoid Class 1 NICs the Inland Revenue will investigate such arrangements and seek to collect any unpaid Class 1 NICs due as a result of these investigations.

Special Cases

10. Session Musicians:

Session musicians is a term which describes the elite group of musicians who did not pay Class 1 NICs prior to July 1998. In accordance with the Revenue's policy intention Session Musicians and their deputies will not fall under the 2003 regulations.

11. Disc Jockeys:

Disc jockeys, although engaged under Equity contracts would not fall to be included in the definition of 'entertainer' and, therefore, are not covered by the 2003 regulations. However, disc jockeys who provide additional services which satisfies the definition of entertainer may be covered depending on the nature of the contract.

12. Regular Members of Orchestra or Chorus:

With the exception of the major London orchestras, musicians and singers who are permanent members of major orchestras and choruses are generally engaged under contracts of service and chargeable to tax under the employment income rules with Class 1 NICs liability.

13. Entertainers from Overseas:

Where an entertainer comes from a member state of the European Economic Area or a country which has a reciprocal agreement with the UK and provides a form E101 or equivalent certificate of continuing liability under their own domestic legislation, the special rules for entertainers will not apply. This will be the case even if the individual is engaged in the UK and remuneration includes a salary element. Instead the entertainer will remain in the category of earner determined by its own country's domestic legislation.

Further Information

14. If theatre engagers or their representatives have any questions about the status of entertainers in the light of this legislation or any individual wishes to query their status they should contact their local Inland Revenue office. Engagers and workers in the TV Industry should ring the TV Industry Unit on 0161 2613255.

Film Production companies and their advisors may contact the Film Industry Unit on 0191 490 3662.

SECTION B

ARRANGEMENTS FOR CLAIMING REFUNDS OF CLASS 1 NICs PAID IN ERROR

Who can claim refunds

1. The 1998 Regulations have led to some entertainers being wrongly categorised as employed earners because their remuneration did not consist ‘wholly or mainly of salary’ and therefore any primary or secondary Class 1 contributions which have been paid in relation to entertainers on the footing that they were employed earners may have been incorrectly paid. There is provision under National Insurance legislation for the return of contributions which have been paid in error and refund claims will be invited for appropriate periods between 17 July 1998 and 5 April 2003 (and in some cases beyond).
2. As previously notified the Inland Revenue waived the legislation restricting refund claims to 2 years provided for in section 19A of the Social Security Contributions and Benefits Act 1992 for the purposes of this exercise but this concession ended on **5 April 2005**, so any claims for refunds under this guidance made after this date will be subject to the normal rules.
3. However, entertainers can choose not to have their primary contributions refunded, but to let them count instead towards their Additional Pension (AP) entitlement, as if they had been correctly paid. This does not prevent the engager from seeking a refund of the wrongly paid secondary contributions or the entertainer notifying the Revenue before they reach pension age that they now wish to claim a refund. Any such claim in these circumstances would be subject to the normal time limits for the claiming of refunds of erroneously paid contributions.
4. Primary Class 1 NICs refunded to entertainers will be reduced by the amount of any Class 2 and 4 contributions which were due from them as self-employed earners, and of any contribution based Jobseekers Allowance paid on the basis of the incorrect Class 1 contributions.

How do I know if I am entitled to claim a refund?

5. If Class 1 NICs have been paid between 17 July 1998 and 5 April 2003 in respect of entertainers whose remuneration in respect of services performed between those dates did not satisfy the ‘wholly or mainly by salary’ criteria in

the 1998 regulations then the engager is entitled to apply for an immediate refund

of those contributions. For example, remuneration made up of 60% Rights Payments and 40 % Salary would not be ‘wholly or mainly by salary’ and there would have been no liability for Class 1 NICs. However, Class 1 NICs were properly payable in cases where, at the time of the engagement, it was known that the salary element of the remuneration exceeded any residuals.

6. We have obtained legal advice in cases where the salary exceeded the fee element at the time of the engagement but subsequent rights payments made as and when they arose resulted in the rights payments ultimately exceeding the salary. Solicitors have advised there are two further scenarios to consider:
 - (i) If Class 1 NICs have been paid up to or beyond 5 April 2003 in respect of entertainers whose remuneration in respect of services provided between 17 July 1998 and 5 April 2003 has subsequently been exceeded by the amount of rights payments, then a refund claim can be made immediately on the basis that remuneration is no longer ‘wholly or mainly by salary’.
 - (ii) Where Class 1 NICs have been paid up to or beyond 5 April 2003 for those entertainers in respect of whom rights payments may not at present exceed salary but would, however, on the balance of probabilities exceed the salary level either before 5 April 2005 or beyond that date then, subject to satisfactory evidence, a refund may be claimed on that basis.
7. The following table should help you decide whether or not the various elements of remuneration under any of the standard BBC/Equity, ITVA/Equity or PACT/Equity contracts satisfy the case law definition of salary (see page 1):

TYPE OF PAYMENT	SALARY/ RIGHTS PAYMENT
Engagement Fee	Salary or Rights payment depending upon contract type
Attendance days	Salary
Standby days	Salary
Holiday pay	Salary
Overtime	Salary
Additional Use fee	Rights payment for pre-purchase
Retainer	Salary – to ensure services available when needed
Royalty	Rights payment - at each sale of programme
Residual	Rights payment - either pre-purchase or at each sale.
Option fee	Rights payment – to ensure an engager has priority use of an entertainers services.

How to make a claim

8. An engager or entertainer who considers that Class 1 NI contributions may have been incorrectly paid after 17 July 1998 in the circumstances described in these guidance notes may apply for a refund. Claims for all tax years should be submitted together. Anyone who wishes to do so in the belief that workers previously treated as employed earners should have been regarded as self-employed should write to:

National Insurance Contributions Office,
Refunds Group,(Erroneous 4)
Room BP1001
Benton Park View,
Newcastle upon Tyne
NE98 1ZZ

Alternatively they should telephone Refunds Group on 084591 –54042 to request a claim form [calls will be charged at BT local rates.]

9. As an alternative to the written application form applicants may find it more convenient to submit claims for refunds by CD-Rom or floppy disk. Engagers should indicate which method they prefer.

What we need to know from you

10. Please give as much information as possible when making a claim i.e. Full name of individual / Stage Name (where appropriate)/ NI NO/ Date of Birth/ Correct address. You will also be required to declare:
 - (i) All Basic and Rights Payments made in each tax year for which a claim is made.
 - (ii) Total earnings on which NICs were deducted and total amount of NICs paid.
 - (iii) Amounts of employers and employees contributions.
 - (iv) The type of contract under which the individual has been engaged; If it is either of the standard BBC/EQUITY, ITVA/EQUITY or PACT/EQUITY contracts then, subject to IR audit requirements, no other documentary evidence of payment will be required. Contracts and/or invoices will be required in all other cases.

Additional Evidence

11. For claims under scenario (1) in para 6 above an additional statement that for the individuals concerned rights payments of a 'X' amount had now exceeded salary of 'Y' amount, showing evidence of the date this occurred would suffice.
12. For claims under scenario (2), i.e. where rights payments have not at the time of the claim yet exceeded salary but are expected to in the future, the Revenue would need to be satisfied that a sufficiently high percentage of entertainers had already received rights payments in excess of salary. This evidence should be in the form of industry statistics which would satisfy us as to prevalence and anticipated future trends in repeats. In other words evidence that would support the contention that because the entertainer has so far received salary of 'Y' amount and rights payments of 'X' amount, on the basis of anticipated future repeats the salary amount will be exceeded. This would need to be accompanied by a covering statement from an authorised representative of the engager that "for all of the refund claims submitted it is expected that the repeat fees and royalties will exceed the salary payments for the particular programme."

If information is incomplete or incorrect

13. We will be unable to proceed with your claim and you will be asked to provide the additional information.

What happens when we receive your claim

14. On receipt the claim will be registered and if sufficient information is supplied, all secondary Class 1NICs confirmed as erroneously paid will be refunded. All claims will be dealt with in the order they are received and will be processed as soon as possible. Employees named on the claim form whom, as a result of previous refund action have already notified the Inland Revenue that they did not wish to claim a refund of primary NICs, will not be contacted but applications will be accepted from those individuals who choose not to allow their wrongly paid contributions to remain on their NI record. Immediate applications for refund of primary NICs will also be accepted from individuals who can provide evidence that their engager has already received a refund of their secondary NICs on the basis of probability that future repeat fees and royalty payments will eventually exceed salary (see para 12 above.)
15. If you are in any doubt about the categorisation of entertainers you have engaged or you are an entertainer yourself and wish to query your own position then contact your nearest Inland Revenue office and ask to speak to a member of the Status team. Enquiries about entertainers engaged by TV Broadcasting Companies should be made to the TV Industry Unit on 0161 2613255